Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Service Rules for the 746-764 and 776-794	)	
MHz Bands, and Revisions to Part 27 of the	)	WT Docket No. 99-168
Commission's Rules	)	
	)	
Carriage of the Transmissions of Digital	)	CS Docket No. 98-120
Television Broadcast Stations	)	
	)	
Review of the Commission's Rules and	)	
Policies Affecting the Conversion to Digital	)	MM Docket No. 00-39
Television	)	

To: The Commission

REPLY COMMENTS OF USA BROADCASTING, INC.

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September 15, 2000

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REPLY COMMENTS OF USA BROADCASTING, INC.

USA Broadcasting, Inc. ("USAB"), pursuant to Section 1.415 of the Commission's Rules, respectfully replies to certain comments submitted in response to the *Further Notice of Proposed Rule Making* in the above-captioned proceeding. 1/

I. INTRODUCTION AND SUMMARY: USAB'S BUSINESS PLAN IS PREDICATED ON THE CONTINUED EXISTENCE OF AN AUDIENCE FOR OVER-THE-AIR BROADCAST TELEVISION.

USAB is in the business of owning and operating over-the-air television broadcast stations. The success – indeed, the viability – of USAB's stations and its business is entirely dependent upon its capacity to transmit programming that will reach a wide audience of viewers. USAB has invested millions of dollars in its television

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1/ *See* Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 00-224 (released June 30, 2000) ("FNPRM").

stations, which each day serve the public interest with a robust, free, over-the-air television service.

Recently, in particular, USAB has committed substantial resources to the development and implementation of a new format for its television stations, many of which are located on channels 59-69, with the goal of transforming them into vibrant local outlets serving their diverse communities with an expanded variety of programming - from news and information to sports to entertainment. Since June 1998, USAB has launched the new format on three of its stations, at considerable cost in facilities, equipment and personnel. At the same time, USAB is endeavoring to fulfill Congress' and the Commission's DTV directives - at significant expense - by constructing digital facilities for all of its stations.

The enormous expenditures made by USAB in connection with its local programming initiative and the construction of its digital facilities are recoverable only over the long term. Thus, USAB's business plan depends upon the stability, continuity and growth of its stations. A fundamental change in USAB's television operations - for example, a channel change for an analog station or the early conversion of an analog station to digital operation - will result in significant outright losses in viewership and in severe disruption of USAB's relationships with remaining viewers and with advertisers and program suppliers, all of which have been developed over time (and are continuing to develop) and only with a huge investment of financial and human capital.

Yet, in implementing the Congressional directive to redevelop the 700 MHz band for commercial use, the FCC is encouraging incumbent channel 59-69 broadcasters, including USAB, to participate in a policy initiative that would necessitate

a radical departure from their established business plans. Instead of viewing the broadcast business as a long-term venture where viewership is the key to revenue and therefore to viability, the Commission has suggested that these broadcasters cease analog operations altogether with the result that, for an indefinite period of time and subject to the acknowledged vagaries of the digital conversion timetable, 2/ they would be abandoning their over-the-air viewership (except for the miniscule audience with digital reception equipment). And now some commenters have urged the Commission to consider implementing rules that could *mandate* migration by incumbent channel 59-69 licensees well in advance of the December 31, 2006 target DTV conversion date. 3/

As it indicated in its Comments, USAB is mindful of the Commission's complementary policy goals of development of the 700 MHz band for advanced wireless applications and early transition to DTV. USAB also has made clear that it is not opposed to the implementation of a regulatory scheme that would facilitate voluntary band-clearing agreements between wireless bidders and incumbent broadcasters.

But USAB believes strongly that adoption of a mandatory relocation requirement would fatally undermine the Commission's twin policy goals in this proceeding because, instead of speeding up the DTV transition and 700 MHz spectrum clearing, it would mire the process down in endless regulatory maneuvers and litigation.

2/ *See*, *e.g.*, FNPRM at ¶ 2 (noting that December 31, 2006 deadline for DTV conversion "may be extended under certain circumstances").

3/ *See*, *e.g.*, Comments of Verizon Wireless (August 16, 2000) at 6 (urging Commission to adopt "mandatory" and "involuntary" provisions for clearance of 700 MHz spectrum).

As USAB describes below, mandatory relocation would be unlawful, technically infeasible and fundamentally unfair to USAB and other primarily UHF licensees, which have made significant investments in their businesses based on the legitimate expectation that they would be able to use their analog spectrum in the 700 MHz band until over-the-air digital broadcasting becomes a viable business. Adoption of such a rule would inevitably motivate the parties to focus their efforts on the subsequent legal battles, instead of focusing on business solutions that could, and would, help the Commission expedite the achievement of its two goals.

II. MANDATORY RELOCATION OF CHANNEL 59-69 BROADCASTERS WOULD BE UNLAWFUL, TECHNICALLY INFEASIBLE, AND FUNDAMENTALLY UNFAIR.

A. Mandatory Relocation of Incumbent Broadcasters Would be Unlawful.

Congress made clear in adopting Section 309(j)(14) of the Communications Act that broadcasters will not be required to vacate their analog channels until December 31, 2006, at the earliest. 4/ Furthermore, the 2006 target date itself is a "soft" deadline. The Commission must grant extensions beyond the scheduled date if (1) one or more of the largest television stations in a market do not begin DTV transmission by December 31, 2006 through no fault of their own; (2) digital-to-analog converter technology is not generally available in a market; or (3) fewer than 85 percent of the television households in a market are able to receive digital television signals (either off the air or through a cable-type service that includes DTV stations). 5/

4/ 47 U.S.C. § 309(j)(14)(A).

5/ *See* 47 U.S.C. § 309(j)(14)(B).

In setting the 2006 target date, Congress recognized that it might be several years before a critical mass of consumers acquired digital reception equipment and therefore sought to "ensure that a significant number of consumers in any given market [we]re not left without broadcast television service" 6/ Congress further ensured that viewers would continue to receive unimpaired analog service by mandating that full-service analog television signals remain fully protected throughout the DTV transition. 7/ Given these unequivocal statutory directives, any regulatory scheme that mandates participation in band-clearing by broadcasters would be unlawful. 8/

Any mandatory band-clearing plan that denies an incumbent broadcast licensee the value of the property and equipment necessary and useful in the operation of its station in the channel 59-69 band also would be an unconstitutional "taking". The courts have held that a property interest may arise as a result of a broadcaster's reliance on its license in its investments in equipment and real property, and in its development of a business plan and recruitment of outside investors – notwithstanding the overlayment of a governmental regulatory regime. A broadcast license, in other words, confers precisely the sort of interest implicated in this case: the right to the free and unfettered use of its property by a broadcast licensee during the term of its license.

6/ *See* H.R. REP. No. 217, 105th Cong., 1st Sess. 576 (12997).

7/ *See* 47 U.S.C. § 337(d)(2).

8/ *See* Comments of National Association of Broadcasters (August 16, 2000) at 3-5; Comments of Entravision Holdings, LLC (August 15, 2000) at 2; Comments of Paxson Communications Corporation (August 15, 2000) at 23.

In *IRS v. Subranni*, 994 F.2d 1069, 1073-74 (3d Cir. 1993), for example, the court stated:

> We do not think *Sanders Brothers* holds that an FCC license has none of the attributes of property. The Communications Act itself seems to imply the existence of a limited property right in an FCC license once it is granted. Section 301 states that no license is to be "construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C.A. § 301 (emphasis added). We think this section implies the creation of rights akin to those created by a property interest limited only by the "terms, conditions and periods of the license." Also indicative of a limited property interest are the procedural safeguards against arbitrary revocation of FCC licenses. *See* 47 U.S.C.A. § 312.

(Citation omitted.) Indeed, "it would be unthinkable to conclude that the Congress would provide for the granting of [broadcast] licenses . . . contemplating, in connection with operating a station, investment in building space and equipment, the hiring of talent, the contracting for advertising, and the employment of labor, but at the same time fail to recognize that by whatever technical name they might be called, whether property rights or license rights, interests would arise, in the persons to whom licenses were granted." *National Broadcasting Co. v. FCC*, 132 F.2d 545 (D.C. Cir. 1942) (quasi-property interest afforded licensee the right to appeal FCC modification order) (Stevens, J. concurring).

That describes the present circumstances precisely. Where, as here, Congress and the FCC have guaranteed that Channel 59-69 television licensees will be able to continue to operate their existing analog facilities at least through the end of 2006, and where licensees have continued to invest in their facilities in reliance on that assurance, any FCC-sponsored plan that would deprive broadcasters of their ability to

use their property and facilities associated with those licenses would be unconstitutional.

B. Mandatory Relocation Would be Technically Infeasible.

As the Commission is acutely aware, during the DTV transition there is no excess spectrum for television broadcasting. Band clearance, therefore, can be accomplished in only one of two ways. Under one scenario, an incumbent channel 59-69 broadcaster would be required to convert to digital operations on its in-core digital channel in advance of the tentative December 31, 2006 conversion date. Yet, although the Commission has suggested that broadcasters may be able to initiate analog operations on a digital allotment channel, 9/ such an endeavor would not be technically feasible because the criteria for interference are different for DTV and NTSC operations. For example, NTSC stations are susceptible to interference from taboo channels and first adjacent NTSC channels. Because of these types of interference, the NTSC Table of Allotments was developed in a way to ensure proper separation of so-called taboo channels so as to avoid interference. The DTV Table of Allotments was not developed on this premise. Thus, it will be highly unlikely for a broadcaster to be able to commence analog operations on a digital channel that was allotted based on digital interference assumptions without causing or receiving substantial interference.

Alternatively, the channel 59-69 broadcaster would be required to relocate its operations onto a lower analog channel that has been vacated by another analog broadcaster. Yet, here, too, what might appear to be a simple change from one analog

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9/ *See* FNPRM at ¶ 88.

channel to another is not, if fact, so simple, and would raise numerous questions and concerns. For example, if the replacement channel is allotted to a different community of license, must the licensee that is changing channels file a "major" change application as required by statute? Alternatively, must the new channel be reallocated to the displaced station's original community of license, thereby requiring a Notice and Comment Rule Making proceeding to make a change to the Table of Allotments? And, in any case, the altered coverage of the relocating station on its new channel may (and likely would) result in a loss of service to the public.

C. Mandatory Relocation Would Be Fundamentally Unfair.

As discussed above, USAB and other broadcasters have developed and implemented business plans and made significant investments in reliance on the reasonable expectation that they would retain the use of the spectrum (and associated facilities) allocated under their licenses for a full 8-year term. Channel 59-69 incumbents, like all television broadcasters, have modified their business plans to accommodate the digital construction imperative. But they did so with the expectation that they would be able to continue operating on their analog channels, which would remain the core of their business for the foreseeable future.

Now, broadcasters are being asked once again to reexamine their business plans and to consider ceasing analog operations (or undergo relocation to another channel) well in advance of the 2006 DTV conversion date, to make way for wireless services. But channel 59-69 broadcasters have settled expectations, flowing from the Communications Act, FCC rules and policies and established precedent, regarding the availability and accessibility of their licensed spectrum. Based on those

expectations, they have made substantial investment in the facilities and equipment necessary to operate on their out-of-core channels (in USAB's case, for both analog and digital facilities) – an investment that will be lost if they abandon this spectrum early in order to make way for wireless operators.

III. VOLUNTARY BAND-CLEARING AGREEMENTS ARE A LEGALLY SUSTAINABLE AND EFFICIENT MEANS TO EXPEDITE EARLY MIGRATION FROM THE 700 MHZ BAND.

Notwithstanding the tangible risks involved with premature transition by USAB's stations out of the 700 MHz band, USAB is sensitive to the Commission's goal of facilitating early clearance of the 700 MHz band in order to expedite the availability of the next generation of wireless services. USAB does not oppose the concept of voluntary agreements between wireless companies and broadcasters. Voluntary agreements – as opposed to regulatory fiat – will enable the parties to resolve the many complex issues raised by band-clearing (*e.g.* when will the band-clearing take place? Will the broadcaster cease operations or switch to digital operations? Will the broadcaster switch to a channel occupied by another broadcaster that is willing to vacate?) These issues are appropriate for voluntary negotiations and are not susceptible to regulatory resolution. 10/

Furthermore, any regulatory regime designed to promote voluntary agreements must take into account the business imperatives that govern broadcasters.

10/ *Cf.* Comments of Nextel Communications, Inc. (August 16, 2000) at 3-4 (based on its extensive experience in negotiating relocation of incumbent broadcasters, potential wireless bidder expressed belief that "given the relatively small number of affected broadcasters and 700 MHz auction winners . . . negotiations . . . will likely produce voluntary omnibus agreements . . . .").

Specifically, USAB urges the Commission to offer broadcasters the protection and certainty afforded by full digital must-carry. Without assurances that the nation's cable subscribers will be able to receive the full array of digital broadcast programming, 11/ many broadcasters will be reluctant to abandon their analog operations on an expedited basis. 12/ Accordingly, if the Commission truly desires to develop a regulatory scheme that will facilitate expedited band clearance, it should take this opportunity to eliminate the uncertainty that stems from its delay in addressing digital must-carry rights. Specifically, the Commission should clarify that the digital transmissions of broadcasters – at the very least, those broadcasters that have vacated their analog channels for band-clearing purposes – will be entitled to full must-carry rights (*i.e.,* mandatory carriage of all digital transmission) for the entire bitstream associated with their 6 MHz digital signal.

In addition, to the extent that the Commission is serious about expediting band clearance to make way for new wireless services, USAB urges the Commission to hold firm to the March 6, 2001 auction date. The auction already has been scheduled - and rescheduled - three times. Further uncertainty as to when the auction will proceed will only delay the commencement of negotiations between wireless companies and

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11/ These would include services such as high definition programming and interactive television, and other services that have yet to be developed.

12/ *See* Comments of Paxson Communications Corporation at 25-27; Comments of Shop at Home, Inc. (August 15, 2000) at 7-8; Comments of Maranatha Broadcasting Company, Inc. (August 15, 2000) at 5; Comments of Sonshine Family Television, Inc. (August 15, 2000) at 9; Comments of Sinclair Broadcast Group, Inc. (August 15, 2000) at 5.

broadcasters. 13/ When the Commission last postponed the auction, its rational was that "[p]ostponing the auction . . . provides much needed opportunity for parties to develop positions and plan for, *and even begin to negotiate*, spectrum clearing agreements, thereby increasing the efficient use of the spectrum." 14/ USAB, which has eight analog and two digital allotments in the 700 MHz band, has not yet been approached directly by any potential bidders. There is apparently no sense of urgency on the part of the wireless bidders, and it is likely that this attitude will continue until the Commission makes clear that the auction will go forward on a date certain.

USAB continues to believe, however, that if the Commission provides regulatory certainty and incentives, then broadcasters will participate in voluntary band-clearing agreements.

IV. THE FCC DOES NOT HAVE AUTHORITY TO IMPOSE RELOCATION CAPS.

Some wireless commenters urge the Commission to set caps on reimbursement to broadcasters for band clearance. 15/ This suggestion is not only counterproductive and self-serving, but also at odds with the main theme of the wireless companies' comments – that the Commission must adopt rules that will promote early band-clearance. Clearly, the imposition of relocation caps is not a way to bring broadcasters to the table to negotiate.

13/ *See* Comments of Shop at Home, Inc. at 8.

14/ *See Memorandum Opinion*, FCC 00-304 (released September 12, 2000) at ¶ 9.

15/ *See* Comments of Verizon Wireless at 7; Comments of Industrial Telecommunications Association, Inc. (August 16, 2000) at 4.

The Commission has imposed reimbursement caps in other contexts, but in each instance the cap was a limitation on reimbursement of costs incurred in connection with mandatory relocation to newly available spectrum. In those circumstances, the cap was justified precisely because the Commission had authority to mandate the relocation, alternate spectrum was readily available, and the relocation would not result in disruption of the incumbent's operations or business. Thus, for example, FM radio station licensees may be eligible for reimbursement of their actual costs incurred in connection with an involuntary channel reassignment as a result of a change in the FM Table of Allotments. 16/ Similarly, new licensees in the 800 MHz Specialized Mobile Radio (SMR) service can force relocation of an incumbent to a system with comparable channel capacity so long as the incumbent is reimbursed for the increased costs inherent in operating such a system. 17/

The Commission lacks authority to establish caps on the amount that wireless bidders may pay incumbent broadcasters for early clearance precisely because the facts here are in such stark contrast to the situations cited by Verizon and ITA. *First,* as explained above, the Commission does *not* have authority to mandate

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16/ *See e.g., Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Colonial Heights, Tennessee)*, 15 FCC Rcd 195 (MMB 2000); *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Mishicot, Wisconsin and Gulliver, Michigan)*, 14 FCC Rcd 21412 (MMB 1999).

17/ *See Memorandum Opinion and Order on Reconsideration, Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band; Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, 14 FCC Rcd 17556 (1999) at ¶ 38.

clearance of the 700 MHz band by incumbent broadcasters. *Second*, the relocation that will have to be undertaken by incumbent Channel 59-69 broadcasters will *not* be seamless operationally because the extant spectrum and the substitute spectrum – assuming it is available at all - are not fungible. *Third*, the relocation will entail enormous and unquantifiable business costs and risks.

Finally, there is no question that any cap would reduce the incentive of broadcasters to vacate the band and thus would undermine the Commission's goal of expediting band clearance. Instead of focusing on establishing arbitrary relocation caps that would undoubtedly be challenged in court, the Commission should let the marketplace dictate the value of relocation.

V. CONCLUSION

Mandatory band clearing is infeasible and would serve only to provoke challenges to the Commission's legal authority to compel broadcasters to vacate their licensed analog channels and the constitutionality of such an action. USAB urges the Commission to adopt rules that will facilitate and support voluntary band clearing agreements. The many legal and technical infirmities of a mandatory band clearing

scheme would delay achievement of the Commission's goals to redevelop the 700 MHz band and expedite the DTV transition.

Respectfully submitted,

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September 15, 2000

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I, Charlene Jones, hereby certify that on this 15th day of September, 2000, a copy of the foregoing Reply Comments was sent by first class mail, postage prepaid, to:

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